BEFORE THE STATE PERSONNEL BOARD OF THE STATE CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 31760
	)	
ALBERT STEPHENS	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position	)	
of Group Supervisor (Limited Term)	)	**NO. 94-06**
at the Ventura School, Department	)	
of the Youth Authority at Camarillo	)	January 6, 1994

Appearances: Stuart D. Adams, Attorney, on behalf of the appellant, Albert Stephens; Patricia S. Ostini, Staff Counsel, Department of the Youth Authority, representing respondent, Department of Youth Authority at Camarillo.

Before Carpenter, President; Stoner, Vice President; Ward Bos and Villalobos, Members.

DECISION

Members Ward, Bos and Villalobos:

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected a Proposed Decision of an Administrative Law Judge (ALJ) in an appeal by Albert Stephens (appellant or Stephens), a Group Supervisor (Limited Term) with the Department of Youth Authority (Department) who had been dismissed from his position.[1]

The dismissal was based upon allegations that, while off duty, appellant displayed and discharged a firearm and pled guilty to a violation of Penal Code, section 246.3, willful discharge of a

[1] The record is devoid of any explanation as to why, if appellant was a limited term employee, he was not terminated pursuant to Title 2 California Code of Regulations, Section 282.

firearm in a grossly negligent manner. As cause for discipline, the Department alleged violations of Government Code 19572, subdivision (k), conviction of a misdemeanor involving moral turpitude; subdivision (m), discourteous treatment of the public; and subdivision (t) other failure of good behavior outside of duty hours which is of such a nature that it causes discredit to the appointing authority or to the person's employment.[2]

The Administrative Law Judge (ALJ) revoked the dismissal, based upon the following conclusions: the crime of which appellant was convicted was not one involving moral turpitude; appellant was misled by the Department as to the effect of the guilty plea; the conduct did not amount to discourteous treatment of the public; and, there was no nexus between appellant's misconduct and his position as a Group Supervisor.

The Board rejected the Proposed Decision of the ALJ and determined to hear the case itself, based upon entire record in the case and upon the written and oral arguments of the parties. The Board specifically asked the parties to submit arguments as to whether there is a nexus between the charged misconduct and the appellant's position as a Group Supervisor. After review of the

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[2]In its original Notice of Adverse Action, the Department had additionally alleged violation of SPB Rule 172 and violation of Government Code, §19990. On November 2, 1992, without objection by appellant, the Department amended the Notice of Adverse Action by deleting those charges and adding the reference to Government Code, §19572, subdivision (k).

entire record, including the transcript, exhibits and written arguments of the parties, and having heard oral arguments, the Board concludes that the dismissal should be sustained for the reasons set forth below.

FACTUAL SUMMARY

Appellant was appointed a Group Supervisor, Intermittent on September 30, 1988. He became a Limited Term Group Supervisor on October 1, 1991. Appellant has incurred no prior adverse actions. He is considered a good to excellent employee by his supervisors.

At the time of the incident in question, appellant was assigned to the night shift in a roving security position from 10:15 p.m. to 6:15 a.m. Although appellant was not to carry a gun for the performance of his duties, he had received the approval of the Superintendent to carry a gun while off-duty.

On November 23, 1991, appellant left work at 6:15 a.m. and went to the residence of his supervisor, Lieutenant Howard Walther. They went out together for dinner at a local restaurant. After stopping at Lieutenant Walther's house for a few minutes after dinner, appellant drove to the Stage Door, a local bar that he often frequented. He was friendly with the bartender and some of the regular patrons. He often drank only coffee there, but on the day in question he intended to have a couple of beers.

As he was about to leave the Stage Door, one of the regular patrons and a friend of appellant's, Charlie Hoffman, entered the

bar. Hoffman wanted company and encouraged appellant to remain at the bar with him, purchasing $65.00 worth of drinks for the two of them, consisting of a few beers and an unknown number of shots of 100 proof Peppermint Schnapps. Hoffman became intoxicated and believed appellant was also intoxicated.

Appellant testified that he was too intoxicated to recall events occurring between about 12:30 p.m. and the time he found himself in the Ventura Police Station, several hours later. Hoffman was the only witness present at the hearing who had any recollection of the unfolding of events on the afternoon of November 23. Hoffman admitted however that his memory of the events was not too clear. He did recall seeing that appellant had a firearm in his possession while in the bar, and believed appellant did pull the firearm out.

Hoffman testified that he and appellant decided to go to another bar. They were driven by another friend who had not been drinking, Mike Zurick. While in the car, appellant placed the gun at Hoffman's thigh and joked that he was going to blow Hoffman's penis off. Hoffman testified that they were joking and that he (Hoffman) did not feel threatened. Hoffman did, however, eventually tell appellant to put the gun away and became angry at appellant after he refused to do so. When the vehicle stopped at a stop sign, Hoffman exited onto the sidewalk, crossed the street and turned the corner. The car followed and appellant exited the

car. The two men exchanged angry words with Hoffman telling appellant to drop the gun and appellant swearing at Hoffman. As Hoffman walked away, appellant fired the gun three times into the ground. Hoffman subsequently got back in the truck, and he and Zurick drove away, leaving appellant behind.

At approximately 3:15 p.m., Ralph Martinez, a Ventura policeman, responded to a radio broadcast of a man with a gun chasing another man and shots fired. He arrived at appellant's location and observed appellant to be stumbling on the sidewalk. He ordered appellant to stop, and appellant gave him a blank stare. Officer Martinez noticed the gun underneath appellant's sweater. He patted down appellant and removed the gun along with 39 rounds of ammunition. He noticed that the gun smelled of gun powder and that the hammer of the gun was dangerously cocked. Appellant was detained and was given two breath tests for analysis of his blood alcohol level. The results of the two tests were .224 and .194. Appellant was cooperative throughout the detention procedures.

Appellant called Lieutenant Walther who came to the police station and obtained appellant's release. As instructed by Lieutenant Walther, appellant reported the incident to the Department the following day. In January 1992, the Superintendent revoked appellant's authority to carry a firearm on his person during off-duty hours.

Appellant was charged with violation of Penal Code, §246.3, willful discharge of a firearm in a grossly negligent manner, a misdemeanor. During the plea bargaining process, appellant was offered the options of either pleading "not guilty" and taking the matter to trial on some points raised by his attorney, or pleading guilty and serving 20 days community service, 3 years probation, paying court costs and a community service fee, and getting his record expunged. Appellant testified that the determinative factor in his mind for choosing one of the proffered options was whether he would be able to retain his job if he pled guilty.

Prior to entering his plea, appellant contacted James McDuffy, the Head Group Supervisor/Chief of Security at the institution to determine the effect of the guilty plea. McDuffy contacted the Department's Chief Counsel and others and informed appellant that if he pled guilty and performed community service that there was a likelihood he would not be terminated, but that that was not an absolute assurance.

Believing he had been assured he would not be terminated, appellant pled guilty to violation of Penal Code, §246.3. Appellant subsequently had a conversation with McDuffy during which they discussed that they had both heard that there were some

Department employees who had served jail time and had not been dismissed. McDuffy himself testified he believed he recommended a suspension.

Appellant continued to work in his position from the date of the incident in November 1991 until he was dismissed effective July 1992. He did not miss any work as a result of his community service as he scheduled it to avoid taking vacation time or sick time.

ISSUES

This case raises the following issues for the Board's determination:

(1) Does the charged misconduct constitute discourteous conduct under Government Code, §19572 (m)?

(2) Does the charged misconduct constitute a misdemeanor involving moral turpitude under Government Code, §19572 (k)?

(3) Is there a nexus between appellant's off duty misconduct of discharging a weapon in public and his position as a Group Supervisor with the Department of Youth Authority?

(4) Assuming the charged misconduct constitutes cause for discipline, what is the appropriate penalty?

DISCUSSION

Discourteous Conduct

The ALJ concluded that the charged misconduct of displaying and discharging a firearm did not constitute discourteous treatment

of a member of the public because Hoffman testified that he did not feel threatened by appellant's behavior. We disagree.

While Hoffman did testify that he did not feel threatened because he owns and feels comfortable with guns, he also testified that he told appellant to put the gun away several different times and became very angry with appellant for refusing to do so. Appellant's threats of bodily harm, actions in waving the gun around and pointing it at Hoffman, and refusal to put away the gun away even after Hoffman asked him to do so on several occasions, constitutes discourteous treatment whether or not Hoffman admitted to feeling threatened.

Misdemeanor Involving Moral Turpitude

Appellant pled guilty to the misdemeanor of willful discharge of a firearm in a grossly negligent manner. We agree with the ALJ that there was no evidence to establish that the crime in question involved moral turpitude.

Nexus

The ALJ found that appellant's actions did not constitute a failure of good behavior causing discredit to his employer or his employment because there was no nexus. The ALJ's finding of no nexus was based on the facts that no disruption of the public service occurred and that appellant worked the graveyard shift, seldom interacted with wards, and cannot use a gun in the performance of his duties.

We find nexus. The law is well-established that it is unnecessary to show actual disruption of the public service to establish that an employee's conduct is of such a nature that it causes discredit to the employer. Nightingale v. State Personnel Board (1972) 7 Cal.3d 507.

Furthermore, this Board has now held, in several of its precedential decisions, that because peace officers are held to a high standard of conduct, nexus is established where a peace officer breaks the law. [Monserrat Miranda (1993) SPB Dec. No. 93-11 (nexus established between off duty drunk driving and position of Group Supervisor with Department of Youth Authority).]

In Jesus H. Reyes (1993) SPB Dec. No. 93-04, a Youth Counselor with the Department of Youth Authority was dismissed for off duty conduct which included brandishing his personal weapon while making threatening remarks to a high school coach during football practice. Noting that appellant's "very privilege to carry a concealable firearm emanates from his status as a peace officer and Youth Counselor," the Board found a clear nexus between the behavior and his employment. (Reyes, at p.4). While in the instant case, Hoffman characterized appellant's threats as being made in a joking manner, as opposed to the serious nature of the threats made in Reyes, the fact of matter is that appellant broke the law when he illegally and intentionally discharged his firearm in public. The public today is concerned with the ever increasing

number of guns on the streets and the numbers of innocent people being injured or killed as a result of accidental shootings. The Department can legitimately be concerned about possible discredit resulting from Department employees becoming intoxicated and then discharging their off duty weapons in public for no apparent reason.

Penalty

In exercising its discretion to impose a "just and proper" penalty, this Board typically considers: as the overriding consideration, whether the misconduct harmed or, if repeated, had the potential to harm the public service; the circumstances surrounding the misconduct; and the likelihood of recurrence. [Skelly v. State Personnel Board (1979) 15 Cal.3d 194, 218].

In the instant case, appellant's conduct not only constituted an embarrassment to his position and his employer, but that conduct had the potential to seriously harm the public service. Appellant acted in an extremely irresponsible manner when he became so intoxicated he was completely unaware of his surroundings and then proceeded to joke around and ultimately discharge the semi-automatic weapon he carried only by virtue of his position as a peace officer. Someone could have been hurt or even killed as a result of appellant's reckless behavior.

While appellant had served the Department on an intermittent basis since 1988, appellant had only been a full time employee with

the Department for one month at the time he demonstrated his appalling lack of judgment. While the likelihood of recurrence may be low in light of the fact that the Superintendent has revoked appellant's authority to carry the weapon, we find the harm to the public service so serious as to justify dismissal.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to Government Code section 19582, it is hereby ORDERED that:

1. The adverse action of dismissal of Albert Stephens is sustained;

2. This opinion is certified for publication as a Precedential Decision (Government Code, §19582.5).

THE STATE PERSONNEL BOARD*

Lorrie Ward, Member

Floss Bos, Member
Alfred R. Villalobos, Member

*Members Carpenter and Stoner, concurring in part and dissenting in part:

We agree with the majority that appellant's misconduct constituted more than adequate cause for strong discipline. We feel, however, based on the record, that the incident was an isolated one. Given appellant's otherwise excellent work record, high praise of his supervisors, absence of actual harm aside from embarrassment to the Department, and unlikelihood of recurrence

given that he no longer has authority to carry a firearm off-duty and does not carry one on duty, a one year's suspension would have been an adequate penalty.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on January 6, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board